Office-Supreme Court, U.S.
FILED
MAR 11 1982
ALEXANDER L. STEVAS,
CLERK

NO. 80-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,

Appellants,

versus

HERMAN LODGE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF APPELLANTS

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(1) Section 2 Of The Voting Rights Act Does Not Impose A Discriminatory Impact Standard

This agreement is made by Appellees and a number of the Amici.

The Court of Appeals rejected this contention in this case, 639 F2d at 1364, f.n. 11 (J.S. 10a), and there was no cross appeal. It was also recently rejected in Washington v. Finlay, 664 F2d 913 (C.A.

4th 1981).

"The starting point in every case involving construction of a statute is the language itself." Beal v. Doe, 432 U.S. 438, 444 (1977); Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). Section 2 uses the terms "deny and abridge", and as observed in United States v. Uvalde Consolidated School District, 461 F. Supp. 117, 123 (D.C. Tex. 1978), these terms connote intent or purpose.

Secondly, the terms "deny or abridge" reflect the wording of the Fourteenth, and specifically, the Fifteenth Amendment, and they traditionally have carried a discriminatory intent connotation.

Thirdly, when Congress intended to adopt a disparate impact standard in the Act, it expressly so declared in Sections 3, 4 and 5. The pointed use of the term "effect" in these sections, and its omission in §2, evinces a deliberate decision to give Section 2 a different meaning, under the rule that where certain words are used in one part of an act, and omitted in another, the presumption is that the difference was intentional. 2A Sutherland, Statutory Construction,

§47.23 (1973); Commonwealth of Kentucky v. Rucklehaus, 362 F. Supp. 360, 365 (D.C. Ky. 1973); Feldman v. Philadelphia Nat. Bank, 408 F. Supp. 24 (D.C. Pa. 1976); United States v. Wiltberger, 5 Wheat 76, 5 L.Ed.37, 45 (1820). "A change in phraseology creates a presumption of a change of intent." Crawford v. Burke, 195 U.S. 176, 190 (1904).

Fourthly, the statement of Attorney General Katzenbach relied on by Appellees, is not determinative. The statement should be read in context. The Attorney General was not asked the specific question as to whether §2 adopted an impact or effect test, but whether the word "procedure" as used therein would cover a case where a political subdivision hardly ever opened its registration office. The Attorney General replied, "I suppose that you could if it had that purpose",[1] clearly an assertion of an intent requirement. Immediately following, the Attorney General proceeded to paraphrase the Section, and in so doing, used the word "effect", but the casualness of his

1. Hearings Before The Committee On The Judiciary, United States Senate, 89th Congress, 1st Sess., on S 1564, p. 191 (1965).

remarks here indicate that he was confusing the language of Sections 3, 4 and 5 with that of Section 2, making particularly applicable what this Court held in Allen v. State Board of Elections, 393 U.S. 544, 568-9: " . . . In any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can be conclusive." In so doing, this Court rejected a statement of the Assistant Attorney General to the effect that Section 5 was intended to be limited to registration and voting.

Arrayed against this is the statement of Senator Dirksen, reiterated twice and concurred in both times by the Attorney General, to the effect that §2 was merely a restatement of the 15th Amendment.[2]

It is also argued by Amici that in rejecting bills in 1970 and 1975 which would have repealed Section 5 and substituted a new, "effect" standard, Congress relied on statements that Section 2 already accomplished the same thing (Brief of Georgia Association of Black Elected

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2. Id., pp. 171, 208 (1965), cited by this Court in Mobile (446 U.S. at 61).

Officials et al, pp. 14-16). As Amici concede, however, "The views of members of a later Congress . . . are entitled to little, if any, weight," International Brotherhood of Teamsters v. United States, 431 U.S. 424, 354, f.n. 39 (1979); Tennessee Valley Authority v. Hill, 437 U.S. 153, 193 (1978); United States v. Clark, 445 U.S. 23, 33 f.n. 9 (1980), and more significantly, these statements were made in opposition to pending legislation, not in support, and this Court has many times held that the statements of opponents of legislation as to meaning are not to be relied upon. Woodwork Mfgrs. Assn. v. NLRB, 386 U.S. 612, 639-640 (1967); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951); NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288, Note 22 (1956).

Lastly, this Court should not construe Section 2 as having an "impact" or "effect" standard absent more compelling language or legislative history requiring that construction. To begin with, Section 2, because of its universal, permanent application, may well not be subject to the limiting construction placed on the

"effect" language of §5 in Beer v. United States, 425 U.S. 130, 141 (1976), as being designed to prohibit changes which lead to retrogression. An unqualified impact law would place in doubt election codes, governmental structures and districting schemes for congressional, state legislative and local political subdivision bodies all over the nation. At-large voting itself is a rational election method, serving valid interests and is also a simplified way of satisfying the one-man, one-vote requirement in many jurisdictions. It is in wide use throughout the United States. Of the 50 largest school boards in the United States, 32 use at-large voting. Black Voters v. McDonough, 565 F2d 1, 2 (C.A. 1st 1977). Almost two-thirds of all cities elect their councilmen at-large. As to counties, 40% elect at-large, and another 20% elect the presiding officer at-large, and the recent trend is toward at-large elections. Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L.R. 790 (1968). See also, City of Mobile v. Bolden, 446 U.S. 55, 60 (1980). As of 1970, 46% of the upper houses and 62% of the lower

houses of state legislatures, contained some at-large seats. Whitcomb v. Chavis, 403 U.S. 124, 157, Note 37 (1971).

An "effect or impact" standard not only will vary from year to year, depending upon the facts upon which it operates, but it would produce different results in different parts of the state. Indeed, such a standard would subject to judicial scrutiny, the voter and candidate qualification laws throughout the country, and very likely require that they be validated in the same manner as employment tests under the effect standards of Title VII. Compare Griggs v. Duke Power Co., 401 U.S. 424 (1971).

(2) Adoption Of At-Large Voting During The 1960's Does Not Establish Intentional Discrimination

Appellees argue that the fact that a number of Georgia Counties changed to at-large voting during the 1960's, following enactment of the Voting Rights Act, is evidence of intentional discrimination. (Brief, p. 31). This is not so. As this Court observed in Whitcomb v. Chavis, 403 U.S. 124, 157, f.n. 37 (1971). "[T]here is no doubt that some states switched to

multi-member districts as a result of those (reapportionment) decisions. That is what happened in Georgia. Baker v. Carr was decided March 26, 1962. In Dusch v. Davis, 387 U.S. 112 (1967), this Court held that assuming but not deciding that the one-man, one-vote principle applied to political subdivisions,election of the members at-large from residency districts would satisfy the Constitution. About this time, speculation was high that the one-man, one-vote principle was going to be held applicable to political subdivision bodies, as this Court later did in Avery v. Midland County, 390 U.S. 474 (1968), and Hadley v. Junior College District, 397 U.S. 50 (1970). This issue was raised in a case involving Thomas County, Georgia. The district court in that case held on June 22, 1966, that at-large voting of commissioners running from unequally-populated districts satisfied the Constitution, and the Court of Appeals affirmed on June 26, 1967. Davis v. Thomas County, 380 F2d 93 (C.A. 5th 1967). This prompted many counties which had district election arrangements involving unequal districts, to simply amend their district laws so as to retain the districts, but to require

at-large voting. That is precisely the case with respect to the 18 counties referred to in Appellee's trial brief, pages 13-14 (R. 398-99). The Thomas County case indicated a simple means for counties having malapportioned districts to comply with the law.

(3) Factual Misstatements In Appellees' Brief And The District Court's Opinion

Appellees' Brief devotes 23 pages to reviewing evidence, mostly on matters not relating to voting. A number of misstatements are contained therein, which require response:

(1) A defendant's witness stated the only reason he could think of for the at-large voting was the desire to prefer one race over another (Brief, p. 20). What the witness said was that the only purpose of changing from at-large voting to a district basis would be in order to favor one race over the other (T. 101).

(2) If you could not pass the literacy test, you would be subjected to Georgia's question and answer test, and that a significant number of blacks tried that test, citing (T. 812-13) (Brief, p.

3). The witness did not say that "a significant number of blacks" tried the test, and more significantly, she doesn't recall a single black person every failing Georgia's literacy test (T. 802). She further testified that the office always followed the same procedure for whites and blacks (T. 803).

(3) Throughout Appellees' brief, reference is made to the fact that there was more vigorous opposition to school desegregation in Burke County than any other county in Georgia, and that there was much fear on the part of blacks and whites concerning desegregation (Brief, pages 2, 10, 11, 15 and 16). These statements are based upon the testimony of Mrs. Frances Pauley, who testified that she came to Burke County about 6 times in 1967 when desegregation was just beginning (T. 110-134). The fact is, however, that these apprehensions did not prove to be true, for it appears that the white school population in Burke County decreased only 6 percentage points, from 28.85% of the total before desegregation, to 22% after (T2. 81). This means that in fact, desegregation worked better in Burke County than it did in Washington, D.C., where

the white school population dropped from around 50% to less than 15% (See Hansen, Danger in Washington), or in Atlanta, Georgia, where the white school population has dropped from 60% before desegregation, to around only 10% at the present.

(4) Before the Voting Rights Act, blacks were virtually eliminated from voting, citing (J.S. 71a-71)(Brief, p. 3). There is no evidence that blacks were eliminated. The reference to the Court's opinion was merely to the effect that blacks were not registered in large numbers prior to the Voting Rights Act. The testimony was undisputed that they had never had any trouble registering, voting or running for office. See Appellants' Brief, pp. 33-34, for discussion and citations).

(5) To this day, voter registration has been made as difficult in Burke County as possible (Brief, p. 4). There is no evidence whatever to this effect. Indeed, the evidence is to the contrary for it shows that at the request of plaintiffs, the County officials opened up 3 new registration sites which were not really needed.

(6) The districts adopted by the Democratic Executive Committee for electing members of the Executive Committee all had white voting majorities, citing (T. 534-42, 891-92) (Brief, p. 9). The testimony does not support this assertion.

(7) In the few years before this case was filed, black people were shot at in Burke County for seeking equal rights, citing (T. 113, 125-6, 134, 682-83). The one incident referred to, however, was not the action of an organized group, but of a single individual who was ruled mentally incompetent and was sent to prison for shooting his father-in-law and stabbing his wife (T. 154, D.E. 73).

(8) Blacks are rarely appointed to boards or commissions. (Brief, p. 11). The evidence, however, shows the following black appointments:

2 black members, Recreation Commission (T. 857, 875)

2 members, Democratic Executive Committee (T. 890-1)

George Williams, registrar (one of 3 registrars), succeeded a prior black appointee (T. 940, T2. 188)

Joe Lewis, Department of Family & Children's Services (T2. 188-9)

(Now, 3 of the 5 board members are black)

Marvin Mobley, black, nominated for DFCS board (D.E. 54, 2nd Page)

Samuel Stone, Planning Board, CSRA (T2. 189), and Jury Commission (T2. 190, D.E. 22)

Three black deputy sheriffs (T2. 191)

Mr. Hankerson, appointed to head youth program, with 2 black counselors (T2. 192)

Arthur Stewart, Neighborhood Youth Corps Director (T2. 196-7)

Watson Blount - Board of Registrars (D.E. 19)

Clifford Jones - Board of Registrars (D.E. 20; T2. 188)

Alvin Robinson, Jury Commission (D.E. 23)

John M. Ellis, Board of Education (D.E. 24; T. 79)

Calvin Thornton, CSRA Board (T. 290, 825)

Porter Anderson, Youth Summer Program (T. 825-6)

Elizabeth Carter, Hospital Authority Board (Appointed after trial)

(9) Throughout Appellees' brief, the argument is made that Burke County

has not been responsive to the needs of blacks. The district court so found (J.S. 77a). Appellants submit that this finding was clearly erroneous, as they did below (Brief of Appellants in Court of Appeals, pp. 2, 30). The Court below completely disregarded undisputed evidence that the Commissioners:

(a) Established 3 new registration sites at the request of blacks (P.E. 105, D.E. 4; T2. 193).

(b) Denied a beer license to a white which was opposed by blacks. (D.E. 48, 49).

(c) Authorized a survey of land lots in Gough at request of a black citizen (T2. 134).

(d) Furnish administration costs for handling CETA employees, and allocate CETA employees to black programs, and a black private school, Boggs Academy (T. 180, T2. 186-7, 201).

(e) Provided $150,000 to purchase a building for the Burke County Training Center (Mentally retarded) which serves mostly black (T2. 203, D.E. 7, 49, 50).

(f) Allocated $8000 to Child Day Care Center (D.E. 9, T2. 204, 151); and $6770 on another occasion (T2. 227, explaining P.E. 244).

(g) Applied to HUD and EDA for a grant to move deteriorated housing (T2. 210).

(h) Approved a county transportation program which was worked out in detail with the county's obligations defined specifically (T2. 37, T2. 221; D.E. 71). A prior program was rejected because no details were presented, and it would have imposed great expense on the county in 2 years (T. 829-834; T2. 220, 169; D.E. 6).

(i) Do grading and repair ditches at 12 black churches (T2. 215-216).

(j) The County has at least 16 unpaved roads which serve predominantly white areas (T2. 212-215, 219). Plaintiffs identified 17 roads which indicate either paving only for white areas, or lack of paving in black areas (T. 700-705; 616-619). Four of these roads which were paved to a white residence, however, were not done by the Commissioners, but were political roads provided by past governors to political friends (T2. 216-7).

(k) Participate in a recreation program providing $30,000 annual operating funds (T. 858, 729; T2. 194; D.E. 51, 52,

68), and $43,000 for a new building (T. 864) and allocates CETA employees for the program (T. 858).

(l) Recently paved 2 roads in predominantly black areas (T2. 208-209).

(m) Joined the CSRA Manpower Council to get funds (D.E. 8).

(n) Paved the streets in Gough, a predominantly black community in 1976-77 (D.E. 68; T. 132).

(o) Approved these programs benefitting blacks:

(1) Weatherization Program, whereby homes are repaired against the elements (T. 338; T2. 178)

(2) Emergency Program to pay past-due utility bills (T. 331)

(3) Dental program for kindergarten and first grade, 85% of clients are black (T. 963-4)

(4) Prenatal program - one of few counties having this (T. 965; T2. 8, 22)

(5) Transportation by Health Department of persons needing it for other programs (T. 966, 973)

(6) WIC program, supplemental food for ages 1-18, milk, cheese, etc. (T. 966, 175)

(7) Infant clinic (T. 968)

(8) Counseling program for parents (T. 969)

(9) Early Periodic Screening, Diagnosis and Treatment Program (EPSDT) Free health examinations (T. 970)

(10) Clinic at Gough (T. 975)

(11) Clinic at Vidette (T. 976)

(12) Clinics at Sardis and Midville (T. 977)

(13) Mental health program (T2. 9)

(14) High blood pressure clinic (T2. 3)

(15) Transportation program by DFCS to Augusta (T2. 48, 52)

(16) Provides 2 employees, and pays costs of administering food stamp program (T2. 58-63; T2. 184, 205)

(17) DFCS emergency fund for food and medicine (T2. 59, 836, 140)

(18) Migrant farm worker programs (T2. 64)

(19) County provides much more than required by the Hill-Burton committment for free hospital services to indigent, 82% of whom are

black (T2. 124)

(20) Rural Health Initiative Program approved (T2. 126, 920, 927)

(21) OIC Program, brick mason course in Midville (T2. 198; D.E. 10, p. 2)

(22) Feed-A-Kid Program, money and other contributions (T2. 200; D.E. 11)

(23) Senior Citizens' Hot Meal Program (T2. 203)

(24) Dermatology Clinic (Dr. Abalee) (Dep. of Dr. Byne, p. 13 and T. 919).

CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

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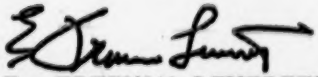

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